SUPREME COURT, U. S.
MAR 16 1973
MICHAEL RODAK, JR., CL

IN THE

# Supreme Court of the United States

October Term, 1972

72-1264

No.——

THE MAYOR OF THE CITY OF PHILADELPHIA AND THE EDUCATIONAL NOMINATING PANEL OF THE CITY OF PHILADELPHIA,

*Petitioners*

*v.*

EDUCATIONAL EQUALITY LEAGUE, et al.,

*Respondents*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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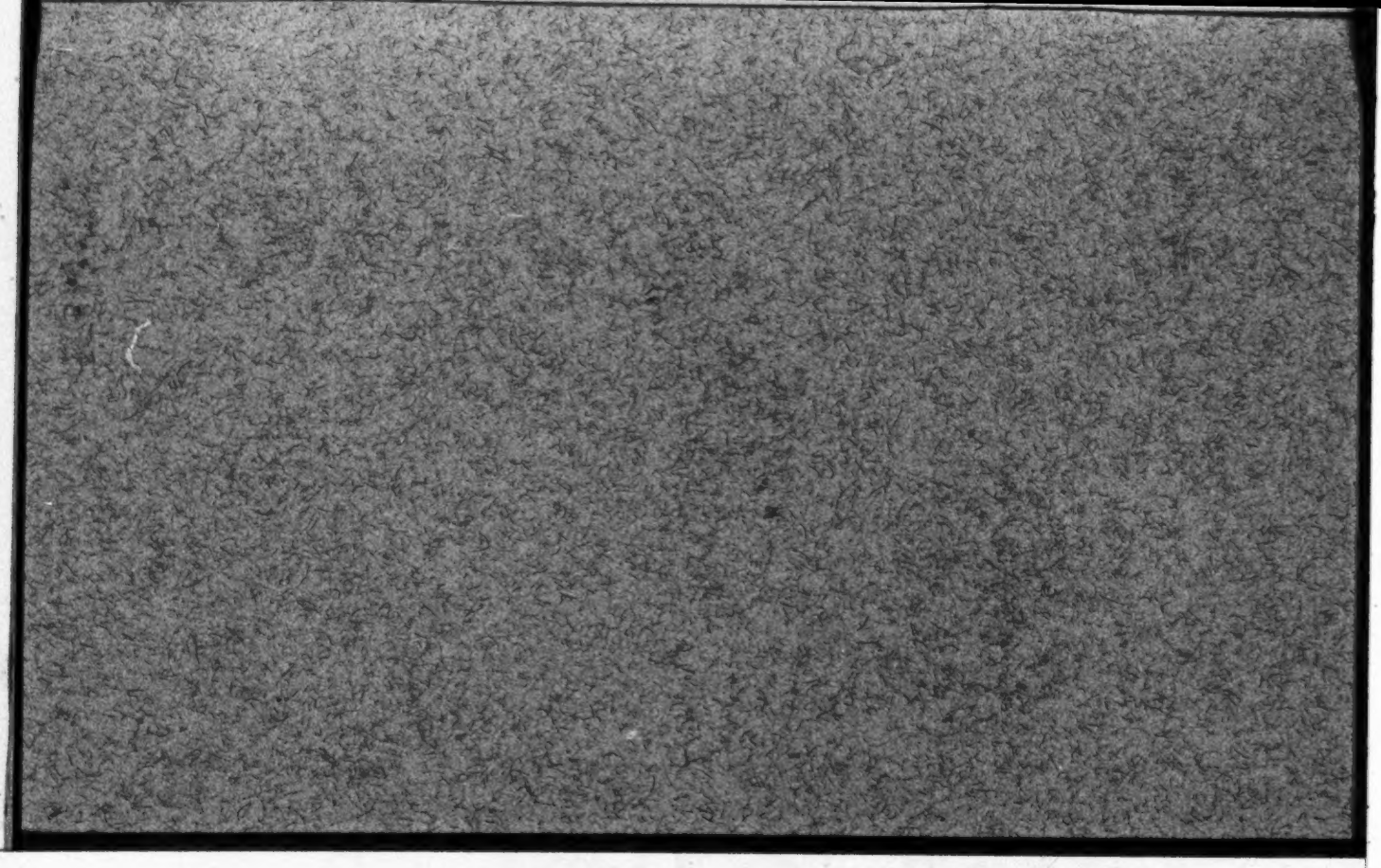

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## Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

The Petitioners,[1] the Mayor of the City of Philadelphia and the Educational Nominating Panel, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 11, 1973, as modified on February 21, 1973, reversing the judgment of the United States District Court for the the Eastern District of Pennsylvania; finding that the former Mayor of the City of Philadelphia had discriminated on the basis of race in appointing to the Educational Nominating Panel; and requiring the present Mayor of the City of Philadelphia to

1. When the cause was adjudicated in the District Court the Mayor of the City of Philadelphia was the Honorable James H. J. Tate. However, since the first Monday in January 1972, the Honorable Frank L. Rizzo has been Mayor. Mayor Rizzo has never been made a party to this action.

submit evidence of his non-discrimination to the District Court on remand.[2]

## OPINION BELOW

The opinion, as modified, of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the United States District Court for the Eastern District of Pennsylvania is reported at 333 F. Supp. 1202 (E.D. Pa. 1971), and appears in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 11, 1973. A timely petition for re-hearing and re-hearing en banc was denied on February 22, 1973, and this Petition for Certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

Whether the Court of Appeals' reversal based on a finding of direct evidence of intent to discriminate on the basis of race on the part of the former Mayor of the City of Philadelphia violated the constraint of Rule 52(a) F. R. C. P., which limits reversals to clearly erroneous findings.

Whether evidence of statistical under-representation of black persons combined with an opportunity to discriminate is the appropriate formula to shift the burden of proof in this case:

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2. Respondents, the Educational Equality League, Floyd L. Logan, W. Wilson Goode, Veronica Kellam, by her mother and next friend, Elizabeth Kellam, and Michael Green, by his father and next friend, Coolidge Green on behalf of themselves and all others similarly situated, moved for the "Declaration of a Class Action" which the District Court granted stating: "It is clear that a class consisting of all blacks in the City of Philadelphia meets all the requirements of Rule 23(a)."

(1) Where the chief elected official's discretionary appointment power is being reviewed by the Court;

(2) Where the qualifications for appointment are definite and limiting and have never been subjected to constitutional attack;

(3) Where, regardless of the executive's involvement and the limiting qualifications, the positions available are so small in absolute number as to make statistical underrepresentation inconclusive at best; and

(4) Where the unrebutted evidence discloses that under former Mayor Tate, minorities made very impressive advancements in all fields and at all levels of City government.

Whether the Court of Appeals was justified in fashioning its Order prospectively where the foundation of the holding was based on evidence of practices of former Mayor James H. J. Tate's administration and where absolutely no evidence exists that the present Mayor, not a party to the action, Frank L. Rizzo, has discriminated.

## STATUTORY PROVISIONS INVOLVED

**United States Constitution, Article II:**

> Section 2. The President . . . shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States. . . . But the Congress may by law vest the appointment of such inferior officers, as they think proper in the President along. . . .

**First Class City Public Education Home Rule Act of August 9, 1963, P.L. 643 [53 P.S. §13202 (Pocket Part 1972-73)]:**

> **Article II, Section 2: Cities empowered.** Any city of the first class may frame and adopt charter provisions governing the administration of a separate and independent home rule school district. . . .

**Philadelphia Home Rule Charter, Adopted by the Electors April 17, 1951:**

**Section 3-404. All other officers.** Except as expressly otherwise provided in this charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power. . . .

**Philadelphia Home Rule Charter, Educational Supplement, Adopted by the Electors, May 18, 1965:**

## ARTICLE XII
## PUBLIC EDUCATION

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### CHAPTER 1
### THE HOME RULE SCHOOL DISTRICT

**Section 12-100. The Home Rule School District.**

A separate and independent home rule school district is hereby established and created to be known as "The School District of Philadelphia."

**Section 12-101. The New District to Take Over All Assets and Assume All Liabilities of the Predecessor School District.**

The home rule school district shall

(a) succeed directly the now existing school district for all purposes, including, but not limited to, receipt of all grants, gifts, appropriations, subsidies or other payments;

(b) take over from the now existing school district all assets, property, real and personal, tangible and intangible, all easements and all evidences of ownership in part or in whole, and all records, and other evidences pertaining thereto; and

(c) assume all debt and other contractual obligations of the now existing school district, any long term debt to be issued, secured and retired in the manner now provided by law.

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## CHAPTER 2
## THE BOARD OF EDUCATION

**Section 12-200. The Board Created; Its Function.**

There shall be a Board of Education of the School District of Philadelphia which shall be charged with the administration, management and operation of the home rule school district.

**Section 12-201. Members of the Board; Method of Selection.**

There shall be nine members of the Board of Education who shall be appointed by the Mayor from lists of names submitted to him by the Educational Nominating Panel, or, if enabling legislation is enacted by the General Assembly of the Commonwealth, elected on a non-partisan basis by the qualified voters of the city, all as more fully set forth in later sections of this Chapter.

**Section 12-202. Eligibility for Board Membership.**

Members of the Board of Education shall be registered voters of the City. No person shall be eligible to be appointed or elected to more than two full six-year terms.

**Section 12-203. Terms of Board Members.**

The terms of members of the Board of Education shall begin on the first Monday in December and shall be six years except that (1) of the first members of the Board appointed and if later there be an elective Board, of the first members elected, three shall be appointed or elected for terms of two years, three for terms of four years, and three for terms of six years, and (2) if the General Assembly enacts legislation permitting the election of members of the Board on a non-partisan basis, the terms of all appointed members shall expire on the first Monday of December immediately following the municipal election at which the first elective Board is elected.

**Section 12-204. Removal of Members of the Board.**

Members of the Board of Education may be removed as provided by law.

**Section 12-205. Vacancies on the Board.**

A vacancy in the office of member of the Board of Education shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died or resigned. If a member of the Board is removed from office, the resulting vacancy shall be filled as provided by law.

**Section 12-206. Educational Nominating Panel; Method of Selection.**

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

(3) a public school parent-teachers association,

(4) a community organization of citizens established for the purpose of improvement of public education,

(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

(8) a degree-granting institution of higher education whose principal educational facilities are located wihin Philadelphia, and

(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Educational Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

**Section 12-207. The Educational Nominating Panel; Duties and Procedure.**

(a) The Mayor shall appoint and convene the Educational Nominating Panel (1) not later than May twenty-

fifth of every odd-numbered year, and (2) whenever a vacancy occurs in the membership of the Board of Education.

(b) The Panel shall within forty (40) days submit to the Mayor three names of qualified persons for every place on the Board of Education which is to be filled. If the Mayor wishes an additional list of names, he shall so notify the Panel within twenty (20) days. Thereupon the Panel shall within thirty (30) days send to the Mayor an additional list of three qualified persons for each place to be filled. The Mayor shall within twenty (20) days make an appointment or, as provided in the following subsection, certify a nomination from either list for each place to be filled.

(c) If the General Assembly of the Commonwealth shall have previously enacted enabling legislation permitting members of the Board of Education to be elected on a non-partisan basis, not later than September fifteenth of the odd-numbered year in which the legislation was enacted or the ensuing odd-numbered year, the Mayor shall select nine names from either one or two lists of 27 names submitted by the Educational Nominating Panel according to the procedure set forth in subsection (b) and shall certify those nine names to the county board of elections as his nominations for members of the Board of Education. In certifying the names of his nominees to the county board of elections the Mayor shall designate three of his nominees as candidates for terms of two years, three for terms of four years and three for terms of six years. The ballots or ballot labels shall not contain any party designation for any of the candidates nominated by the Mayor, and under each name there will be a space permitting the voter to write in the name of any other person. In every instance the Mayor's candidate will be elected if, but only if, he receives more votes than any other candidate whose name is written in. In every subsequent odd-numbered year, three members of the Board shall be nominated by the Mayor from names submitted to him by the Educational Nominating Panel and elected in the same manner provided by this subsection,

and whenever a vacancy occurs the procedure for filling it shall be similar whether the vacancy be filled at a special election proclaimed by the Mayor or at a municipal election.

(d) The Educational Nominating Panel shall invite business, civic, professional, labor, and other organizations, as well as individuals, situated or resident within the City to submit for consideration by the Panel the names of persons qualified to serve as members of the Board of Education.

(e) Nothing herein provided shall preclude the Panel from recommending and the Mayor from appointing or nominating persons who have previously served on any board of public education other than the Board of Education created by these charter provisions.

## STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1343 (3) alleging violation of 42 U.S.C. Section 1983. Specifically, the Educational Equality League alleges that the former Mayor of the City of Philadelphia discriminated on the basis of race in his appointments to the Educational Nominating Panel, in May of 1971.

The method of appointing persons to the Educational Nominating Panel is established by the Educational Supplement to the Philadelphia Home Rule Charter, approved by the electors on May 18, 1965, pursuant to the Act of August 9, 1963, P. L. 643, 53 P. S. Sections 13201-13223. The constitutionality of the Charter has not been questioned.

The Charter provides that during every odd-numbered year the Mayor shall appoint and convene a panel of 13 qualified persons to be called the Educational Nominating Panel ("Panel"). The function of this panel is to nominate three persons for each vacancy on the Board of Education of the School District of Philadelphia ("Board"). From the three persons (or six persons since, if the Mayor desires an *additional* three persons for each vacancy, he merely requests additional names), the Mayor selects and appoints a person to the vacancy on the Board. The Mayor's appointments to the Board have not been challenged, nor indeed, has the quality or dedication of the actual appointees been questioned.

The qualifications for appointment to the Panel vary. Four (4) Panel members must be from the "citizenry at large" "[i]n order to represent adequately the entire community. . . ." Charter, 12-206(c).[3] The remaining nine (9) panel members "shall be the highest ranking

3. The Mayor can, if he chooses on his own initiative, appoint from additional organizations of his own selection to fill these four "at large" positions.

officers of City-wide organizations or institutions. . . ." Charter, 12-206(b). These organizations are described with particularity as:

> (1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,
>
> (2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,
>
> (3) a public school parent-teachers association,
>
> (4) a community organization of citizens established for the purpose of improvement of public education,
>
> (5) a federation, council, or other organization of non-partisan neighborhood or community associations,
>
> (6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,
>
> (7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,
>
> (8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
>
> (9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

Charter, 12-206(b) (1)-(9).

On May 25, 1971, Mayor Tate appointed and convened the Panel.

On August 6, 1971 the Educational Equality League sued Mayor Tate and the Panel alleging the Mayor made his appointments on racial criteria in violation of the Civil

Rights Act of 1866, 42 U.S.C. Section 1983 and requesting a speedy hearing, an injunction against the panel from acting, a judgment declaring that the Mayor discriminated on the basis of race and an order directing the Mayor to appoint a panel "fairly representative of the racial composition of the school community." Complaint, p. 8.

After expedited pre-trial discovery was completed a hearing was held on August 25 and September 7, 1971 before the Honorable Raymond Broderick, Judge of the United States District Court for the Eastern District of Pennsylvania.

At the hearing, the Educational Equality League attempted to offer evidence to support two theories: that the Mayor directly and personally discriminated against black persons when he appointed the Panel; and that the statistical evidence demonstrating the percentage of blacks in the general population of Philadelphia and the percentage of black students in the population of the School District of Philadelphia as compared with the percentage of blacks appointed to the thirteen member Panel creates a presumption of discrimination by the Mayor.

The Mayor and Panel offered evidence to support several theories of defense: that the appointments of the Mayor are protected from judicial interference by virtue of the executive's inherent discretion and the constitutionally mandated doctrine of separation of powers; that the Mayor's appointments satisfied the qualifications required by the Charter; that the qualifications required by the Charter vitiated the applicability of the Educational Equality League's statistical theory since more than mere citizenship and residency are required by the Charter to qualify for appointment to the Panel; and that the statistical theory is invalid as applied to the Panel since the Panel is so small that each individual change on the Panel results in extremely large changes in percentages. Finally, evidence established that the Mayor personally championed the expansion of opportunity for blacks in City employment as well as in appointed and elective political positions and

evidence was offered to contradict any assertion of personal discrimination as to the Mayor.

On November 8, 1973, the District Court issued its Findings of Facts, Conclusions of Law and Order, dismissing the complaint with prejudice. 333 F. Supp. 1202.

The District Court found inapplicable the "percentage rationale," i.e., the Educational Equality League's theory that a prima facie case or presumption of discrimination can be proved by comparing the percentage of blacks in the population of the City of Philadelphia with the percentage of blacks appointed to the 1971 Panel. 333 F. Supp. at 1207.

The District Court discussed but refused to find that the Mayor had discriminated on the basis of race in his appointments to the 1971 Panel.

The District Court did not reach the questions of executive discretion and separation of powers, although it expressed doubts as to its power to interfere with the discretion of an elected executive in his discretionary appointments. 333 F. Supp. at 1206.

The District Court did not reach or discuss the inapplicability of the percentage rationale in relation to the qualifications required by the Charter beyond citizenship and residency.

On November 9, 1971, the Educational Equality League filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

On December 5, 1972 argument on the briefs was heard by Judges Van Dusen, Gibbons and Hunter.

On January 11, 1973 the Court of Appeals issued its judgment vacating the judgment of the District Court except as to the Educational Nominating Panel, and remanding the cause to the District Court for further proceedings.

Timely Petitions for Rehearing were filed by each party, and a Petition for Rehearing En Banc was filed by the Mayor of the City of Philadelphia. All were denied, the Educational Equality League's on February 21, 1973 and the Mayor's on February 22, 1973.

On February 21, 1973 the Court of Appeals entered an order amending its order of January 11, 1973. The Court of Appeals found as a fact that the appointments by the Mayor to the Panel were not within the executive's discretion and that the selection process had a discriminatory effect. The Court of Appeals applied the percentage rationale holding that demonstrating under-representation and an opportunity for discrimination is all that is necessary to establish a prima facie case. Finally, the Court of Appeals found as a fact that the *former* Mayor had discriminated on the basis of race in his selections to the Panel and based on this finding, required the *present* Mayor to submit the bases for his executive judgments to the scrutiny of the District Court on remand.

These findings by the Court of Appeals were directly contrary to those made by the District Court. Furthermore, it failed to consider the evidence adduced that directly contradicted the witness relied upon by the Court of Appeals, and the evidence establishing that Mayor Tate had personally opened areas of opportunity to minorities that had previously been denied them.

The Mayor of the City of Philadelphia and the Educational Nominating Panel moved the Court of Appeals for a Stay of its Mandate pending Petition to the Supreme Court for a Writ of Certiorari. The Court of Appeals ordered its mandate stayed for 15 days with "no further extension. . . ." Order of United States Court of Appeals, March 2, 1973.

## REASONS FOR GRANTING THE WRIT

Although ostensibly involving only one relatively insignificant panel appointed by the highest elected official of the City of Philadelphia, this case involves grave national consequences. As a direct result, and without precedent, the *present* Mayor of the City of Philadelphia, without even having been accused of racial discrimination, is required to submit his executive judgment to the District Court for the Eastern District of Pennsylvania regarding the selection of members of the Panel. The Mayor of the City of Philadelphia has the power of appointment to a broad variety of boards and commissions by virtue of statutes, Home Rule Charter, and Ordinance. Now, if and when racial percentage disparities appear, the Mayor will be subjected to the burden of *disproving* racial discrimination. Likewise, both statewide and nationally, the logical progeny of the holding of the United States Court of Appeals for the Third Circuit would require elected officials throughout the nation to defend and offer positive proof of their nondiscrimination in their executive appointments, whenever percentage disparities appear.

Perhaps, the most obvious situation is with the judiciary. If we assume a disproportionately small percentage of blacks in the Federal judiciary as compared to their proportion of the national population, this case would require the President of the United States substantiate by positive proof his nondiscrimination in his judicial appointments and further substantiate his proper consideration of blacks when making these appointments.

But, beyond the conclusions of law reached by the Court of Appeals there is one finding of fact of grave personal importance. The United States Court of Appeals for the Third Circuit found as a fact that the former Mayor of the City of Philadelphia James H. J. Tate, engaged in unlawful racial discrimination in his appointments to the Educational Nominating Panel. It held that his appointments to the Panel were "tainted." It held that there was

direct proof of the former Mayor's personal discrimination against black people.

Without attempting to portray former Mayor Tate as anything more than an astute politician, the record which Mayor Tate established over his decades of public service evidences a total commitment to the expansion of opportunities to minority groups, including black persons, at all levels of public service employment as well as in political appointments. The record in the District Court discloses an ever-increasing number of black persons employed at all levels of government service over the decade of former Mayor Tate's administration. And yet, as the result of the Court of Appeals opinion the final but critical and unfair judgment of Mayor Tate's Administration is that of discrimination against black persons on the basis of their race. The evidence of non-discriminatory public service was overwhelming. The evidence to the contrary was unsubstantial.

This Court should grant the Petition for this reason if for no other, for it is now the true Court of last resort. A finding of racial discrimination in the face of over-all employment of black people *exceeding* by nearly ten percent (10%) their proportion of the population of the City is hardly justified.

Finally, in terms of relief, the Court of Appeals has directed the District Court to apply the Appellate Court's Finding of Fact that Mayor Tate discriminated to the new Mayor, Frank L. Rizzo. There is no evidence in the record concerning the administration of Mayor Rizzo. The Court of Appeals has, nevertheless, ordered that Mayor Rizzo submit evidence to substantiate his nondiscrimination in appointments to the Educational Nominating Panel. Thus, not only has the Court of Appeals arbitrarily made Findings of Fact which the District Court could not have made, but it has now assumed that the finding of racial discrimination can in some way be transferred to another person who obviously could not have been a party to its first finding. Such a decision would, it seems, bind all future Mayors,

constituting an unlawful infringement of the constitutional scheme of government.

**Point 1**

**In direct conflict with Rule 52(a) of the Federal Rules of Civil Procedure as well as numerous decisions of this Court, the Court below made findings of fact not only without finding clear error by the District Court but without any support on the record before it.**

As has been discussed above, the Court of Appeals reversed the District Court on two bases.

The Educational Equality League had offered two theories in support of their cause of action. One involved indirect proof of discrimination by the so-called "percentage rationale." The other involved direct proof of discrimination on the part of the Mayor, the appointing authority.

In its Opinion and Order of November 8, 1971, the District Court discussed and reviewed the purported direct evidence of discrimination offered by the Educational Equality League. It rejected this testimony.

The Court of Appeals specifically reversed the Order of the District Court and made findings of fact unsupported in the record and without establishing clear error. It found that a number of black oriented organizations met the specifications of seven of the nine categories of Section 12-206(b) of the Charter (Court of Appeals, Opinion Page 6), and that one witness, Mr. W. Wilson Goode testified without contradiction or objection that the then Mayor had stated he would appoint no blacks to the *Board of Education* in addition to the two already on it (Court of Appeals, Opinion Page 6). The Court of Appeals found that Deputy Mayor Zecca was unaware of the existence of black oriented organizations which were within the requirements of Section 12-206(b) of the Charter (Court of Appeals, Opinion Page 6). Finally, the Court of Appeals found that the District Court had "overlooked" Goode's testimony about

the Mayor's statement referred to above (Court of Appeals, Opinion Page 7).

In fact, there is no evidence of qualifying black organizations existing in the categories required by the Charter. Goode testified but was contradicted by witnesses for the Mayor of the City of Philadelphia: Clarence Farmer, Chairman of the Philadelphia Human Relations Commission and Anthony P. Zecca, Deputy to the then Mayor James H. J. Tate. Goode testified that there were one or two organizations which had black leadership which satisfied the categories of the Charter. However, in his own testimony, the deficiencies of these organizations are made evident. For example, to satisfy the qualifications of Section 12-206(b)(1), Goode offered the United Negro Trade Union. His testimony was:

> Q. What does the United Negro Trade Unions represent?
>
> A. That represents all of the union officials who are black and who are in unions in Philadelphia. It is a kind of council of other officials of other black unions. (Goode, N.T. 4-5.)

It is apparent that the District Court refused to find that there were black organizations which qualified under the Charter because, by definition, an organization which is limited to black membership is not a City-wide organization. None of the organizations which are represented on the Educational Nominating Panel have membership which is exclusive or exclusionary. With the possible exception of the Urban League, the organizations referred to by Goode *excluded* non-black membership.

On the other hand, Zecca's testimony disclosed that the organizations selected satisfied precisely the requirements of the Charter. The fact that Zecca knew of no other organizations to qualify under 12-206(b) (1), proves nothing, other than that there may be no other such organization in the City of Philadelphia of such qualifications.

Furthermore, Zecca's testimony discloses the conscientious effort made to comply with the specific provisions of the Charter. In short, there is no evidence to substantiate the finding made by the Court of Appeals that there exists a number of black-oriented or black-lead organizations which meet the specifications of the Charter. The blacks on the Panel came from organizations that were black-lead, but which were not discriminatory in their membership.

The Court of Appeals improperly found that: "although the District Court made no finding on the subject, Mr. Goode testified, without contradiction or objection, that shortly before the 1969 panel was due to be appointed at a time when there was one vacancy for which the 1967 panel had not yet made its nominations, the Mayor stated that he would appoint no blacks to the Board of Education in addition to the two already on it." (Court of Appeals, Opinion Page 6).

Even if true, this statement was allegedly made with reference to the 1969 Panel and not the 1971 Panel. There is no testimony at all relating to the appointment of the 1971 *Panel* or *Board* appointments from its nominations.

This statement by Goode was, furthermore, clearly and directly contradicted by the testimony of Zecca. Zecca testified:

> Q. Mr. Zecca, we were discussing earlier a statement by Mayor Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.
>
> A. I said I don't think he made such a statement.
>
> Q. Well all right.
>
> May I show you a very bad copy of the page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the article says, "he indicated", referring to the Mayor, "he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board."

* * *

Do you recall that article?

A. The witness: "I don't recall the article specifically but it doesn't say he is not going to name another member. It said that he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good representation in the two Negroes now serving on the Board.

They may have asked him whether he was going to appoint anymore Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story." (Zecca, N.T. 259-261)

In fact, the entire colloquy involves the Mayor's intention to appoint persons to the Board, and not the Panel. As has previously been stated the Educational Equality League has made no challenge to the appointments to the Board, but has limited its grievance to the appointments made to the Panel. Therefore, the testimony offered with regard to the Board is irrelevant. But beyond its irrelevancy, it is clearly contradicted by the testimony of Zecca which indicates that the statement may not have been made and if it was made may have been a misquote.

It was improper for the Court of Appeals to make a finding which the District Court refused to make based upon obvious hearsay which was contradicted by other proper evidence. This type of evidence, involving credibility and demeanor, is best left to the determination of a district court.

Also improper was the misstatement by the Court of Appeals of the District Court's Finding of Fact No. 17:

> The person assigned by the Mayor of Philadelphia to choose the groups under the enumerated categories Deputy Mayor Anthony Zecca, at the time of the hearing in the instant case was unaware of the existence of *many* of these black organizations. (Appendix, Page 6a) (Emphasis added.)

The Court of Appeals stated that:

> The District Court found that Deputy Mayor Zecca was unaware of the existence of black oriented organizations which were within the requirements of Section 12-206(b). (Court of Appeals, Opinion Page 6.)

The statement by the Court of Appeals is internally inconsistent in that black orientation is a requirement which is mutually exclusive of the requirement that organizations be Citywide in nature.

Rule 52 (a) of the Federal Rules of Civil Procedure prohibits a Court of Appeals from setting aside Findings of Fact made by a District Court unless those findings are clearly erroneous.

> Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Rule 52 F.R.C.P.

Rule 52 is particularly applicable to the situation in which the intention of a party is at issue. Here, Goode testified to the intention of the Mayor. As this Court said in *United States v. Yellow Cab Company:*

> Finding as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . . The trial court listened to and observed the officers who had made the records from which the government would draw an inference of guilt and concluded that they bear a different meaning from that for which the government contends.
>
> It ought to be unnecessary to say that Rule 52 applies to appeals by the government as well as to those by other litigants. There is no exception which permits it, even in an anti-trust case, to come to this

> Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous."

*United States v. Yellow Cab Company*, 338 U.S. 338, 341-342 (1949).

So long as the Finding of Fact or failure to find a fact is substantiated on the record, the District Court's finding or failure to find may not be reversed. See also, 5 A Moore's Federal Practice Chapter 52.

The burden of proof remains upon the plaintiff even in civil rights cases. The conduct of the Court of Appeals in this case would assume that any statement by a person that another has discriminated, must be taken as true. This is not only legally improper, but also contrary to human experience.

**Point 2**

**The decision below is in direct conflict with both Federal and Pennsylvania law regarding the appointing power of elected officials.**

The second theory upon which the United States Court of Appeals based its reversal of the District Court's judgment is that of the percentage rationale. Construing the decisions of this Court in *Turner v. Fouche*, 396 U.S. 346 (1970) and *Alexander v. Louisiana*, 405 U.S. 625 (1972) the Court of Appeals held that to prevail under the percentage rationale a

> plaintiff need not show a deliberate practice of discrimination; a prima facie case is established by a demonstration that blacks were under represented and that there was an opportunity for racial discrimination. Opinion of the Court of Appeals, Page 10.

While this theory of proof has been applied to jury selection cases, voting registration cases and employment discrimination cases, it has never been applied to situations in which the discretion of a duly elected official in his appointing power has been in question. Indeed, there are a variety of reasons for not applying the percentage rationale to this and similar situations, the most fundamental of which is that principle of American political philosophy that requires the three branches of government to be separate and coequal and that no one branch should be the repository of ultimate power. This principle requires that the judicial branch be loath to interfere in areas of purely legislative or executive concern and likewise in areas of judicial concern the executive and legislative branches should not interfere. As the Pennsylvania Supreme Court recently stated:

> The line of separation or demarcation between the Executive, the Legislative and the Judicial, and their respective jurisdiction of powers, has never been definitely and specifically defined, and perhaps no clear line of distinction can ever be drawn.

*Commonwealth ex rel. Carroll v. Tate et al.*, 442 Pa. 45, 51 (1971).

In *Carroll v. Tate, supra*, the issue involved a legislative encroachment on the judiciary. This case, of course, involves a judicial invasion of the executive. Great caution must be employed in this area, for as the Pennsylvania Supreme Court continued:

> The very genius of our tripartite government is based upon the proper exercise of their respective powers together with harmonious cooperation between

the three independent branches. *Commonwealth ex rel. Carroll v. Tate, et al., supra* 53.

Included in this Court's consideration of the issues here, must, therefore, be the constant consideration of the fundamental principles of American government. The United States Constitution in Article II, Section 2, places in the executive branch certain defined powers. These powers are given generally by and with the advice and consent of the Senate, however, the Constitution further provides:

> [B]ut the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone . . . U.S. Const. art. II, §2.

The landmark decision in *Marbury v. Madison*, 1 Cranch 135 (1803) presents an analogous situation on the national level. The importance of the President's discretion might be considered far greater than the Mayor's discretion. And yet, the difference is only one of quantity and not quality. For the prerogatives of the executive branch in a tripartite government are constant, and any court, as the representative of the judiciary, should not interfere in this area.

The facts of *Marbury* are so well known they need only be summarized here. Plaintiff was an appointee of the President and while the appointment had been made, it had not been delivered. Plaintiff sought an Order in Mandamus commanding the Secretary of State to deliver the appointment. In discussing the correctness of the remedy, the Court said:

> With respect to the officer to whom it would be directed, the intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders an illegal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation.

*Marbury, supra* 71.

But more importantly:

> Where the head of a department acts in a case in which executive discretion is to be exercised . . . it is again repeated, that any application to a Court to control, in any respect, his conduct would be rejected without hesitation.

*Marbury, supra* 71.

The first paragraph quoted above, speaks of the bases for the doctrine of judicial restraint in political questions, a policy argument. However, the second paragraph, states a principle of law which denies judicial interference in the area of executive discretion. Applied to the present litigation, *Marbury* stands for the proposition that lawful appointments within the discretion of the Mayor may not be disturbed except that once an irrevocable appointment is made a Court may order its ministerial execution. Although the complaint in the matter at hand does not directly ask for mandamus, the actual relief granted by the Court of Appeals requires the dissolution of appointments and new appointments made. These new appointments must more adequately represent the black population. This adequate representation can only be achieved by increasing the number of blacks on the Panel. Therefore, the present Mayor of the City of Philadelphia is required to appoint more blacks than at present to the Panel. The import of this decision of the Court below requires that the Mayor abandon his judgment and discretion and perform that purely executive function of appointing in an automatic and ministerial way. This or any similar limitation on the powers of the chief executive is totally impermissible and the District Court properly refused to entertain such an invasion of executive discretion, although it did not reach the issue. As this Court said in *Keim v. United States*, 177 U.S. 289 (1899):

> The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore, it is one of those acts over which the Courts have no general supervising power.

The particular reasons for the executive's discretion in this case are readily discernible in the record and are in keeping with the theme of the entire Home Rule Charter, the organic law of the City of Philadelphia. That theme or theory of government is to place in the hands of the executive the responsibility for his actions. It is obvious that only if the Mayor has the right to choose will the responsibility for the choice be his.

The general principle of law mandated by the doctrine of separation of powers requires that the judiciary not interfere in the executive's discretionary appointments; and the organic law of the City of Philadelphia, the Philadelphia Home Rule Charter, and the general law of the Commonwealth of Pennsylvania requires non-interference in such appointments as well. Subject to those specifically provided for qualifications, all appointees to boards and commissions under the Home Rule Charter are appointed and serve at the pleasure of the Mayor. Section 3-404 of the Home Rule Charter provides as follows:

> All other officers. Except as expressly otherwise provided in this Charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power and until their successors are qualified.

The Charter's statement on the law is consistent with that of the Commonwealth. In *Commonwealth ex rel. Specter v. Vignola*, 446 Pa. 1 (1971) the Supreme Court of Pennsylvania held that:

> Appointed public officers are removable from office at the pleasure of the appointing power. . . .

*Commonwealth ex rel. Specter v. Vignola, supra.* Accord, *Naef v. Allentown*, 424 Pa. 597 (1967); *Philadelphia v. Sacks*, 418 Pa. 193 (1965); *Schluraff v. Rzymek*, 417 Pa. 144 (1965).

Absent proof of actual discrimination by the Mayor, there can be absolutely no justification for the Court of Appeals' opinion. The record clearly refutes any discrimination in these specific appointments.

The Petition should, therefore, be granted.

**Point 3**

**The Court below was unjustified in requiring that the present Mayor, the Honorable Frank L. Rizzo, submit "evidence that the organizations in the black community which qualify have received proper consideration" in making his appointments to the Panel.**

The present suit was brought against James H. J. Tate. At no time was evidence produced regarding the administration of Frank L. Rizzo, Tate's successor in office. Mayor Rizzo had not yet assumed office. In fact the decision of the District Court was made prior to Mayor Rizzo's election. Therefore, there could be no evidence whatsoever regarding the practices of the present Mayor, Frank L. Rizzo, before the United States Court of Appeals for the Third Circuit. And yet, anomalously, the Court of Appeals ordered the staff of Mayor Rizzo to submit to the District Court evidence of non-discrimination in appointments to the Panel.

Footnote 21 of the Court of Appeals' decision suggests the rationale for this direction to the District Court.

> "21. Mayor Tate has been succeeded by the Honorable Frank L. Rizzo and the present case has, of course, involved *no showing that Mayor Rizzo has in any way discriminated against blacks.* Nevertheless,

*on this record*, Mr. Zecca continues as a Deputy Mayor and since this Court finds that plaintifff has shown on this record discrimination in regard to the present panel, the Federal Courts must assure that the appointment of the 1973 panel is free from taint. *Cf. Conover v. Montemuro*, —— F. 2d —— (1972) (3rd Cir. No. 71-1871, filed December 20, at page 13)" (Court of Appeals, Opinion page 12.) (Emphasis added.)

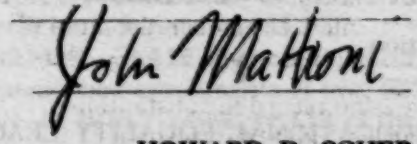
There is no record to substantiate the assumption that Mr. Zecca has today any responsibility for appointments to the Panel. Zecca is Deputy to Mayor Rizzo. Under Mayor Tate he was alone in this position. However, under the present Mayor, Philip R. T. Carroll is the Mayor's immediate subordinate and it is he who oversees the Mayor's office. Zecca, as Deputy to the Mayor, shares this title with Michael Wallace, Esquire. In addition, there are now three assistants to the Mayor. Based on the change in personnel, it would be equally reasonable to assume that the entire nomination process for membership or appointments to Boards and Commissions has been considerably altered. Although there is no evidence bearing on the subject, the fact is that the procedure for filling such positions has been completely revised.

Even if Mayor Tate can properly be found to have practiced personal discrimination, there is no justification on this record to assume or even suspect, that Mayor Rizzo would act in a similar manner. Therefore, the direction to the Court below to enjoin the present Mayor from discrimination is both unwarranted and unjustified. The selection process with respect to the Panel had been challenged only as it involved the then Mayor Tate. While systematic exclusion remains unlawful, there was and is no such allegation as to the present administration.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,



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## APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

---

Civil Action — No. 71-1938

---

EDUCATIONAL EQUALITY LEAGUE, et al.

*v.*

HONORABLE JAMES H. J. TATE, et al.

## FINDINGS OF FACT
## CONCLUSIONS OF LAW AND ORDER

**Broderick, J.** — **November 8, 1971**

This class action was brought by the Educational Equality League and certain named individuals on behalf of themselves and all other similarly situated in Philadelphia, seeking injunctive and other relief to prohibit the defendant, Mayor of Philadelphia, James H. J. Tate, from continuing his alleged racial discrimination in making appointments to the Educational Nominating Panel, which nominates members to the Philadelphia School Board.

After a hearing on the merits on August 25th and September 7, 1971, and a complete study of the applicable law and the briefs of the parties, we make the following:

### FINDINGS OF FACT

1. It is stipulated that the population of the City of Philadelphia is 1,948,609, of whom 653,791 are black.

2. In the 1970-1971 school year, the public school population of the City of Philadelphia was 60.5% black.

3. In the 1970-1971 school year, the public elementary school population of Philadelphia was 60.2% black.

4. In the 1970-1971 school year, the public junior high school and middle school population of Philadelphia was 65% black.

5. In the 1970-1971 school year, the public senior high school population of Philadelphia was 56.2% black.

6. In the 1970-1971 school year, the public vocational school population of Philadelphia was 59.9%.

7. In 1968-69, 42%, or 116 of the 279 schools in the public school systems, had enrollments of over 95% black or over 95% white; in 1970-71, 49%, or 139, of the schools had over 95% one-race enrollments.

8. In 1968-69, 90,105 black students, 54.1% of said students, were in schools with over 95% black enrollment; in 1970-71 the number had increased to 96,014, or 56.7%.

9. The Educational Nominating Panel was set up by the Educational Supplement to the Home Rule Charter, for the purpose of screening applications for school board appointments and nominating three individuals for each vacancy on the School Board for the Mayor's consideration.

10. The Educational Nominating Panel consits of 13 members, 9 of whom are appointed to fulfill certain classifications set out in the Section 12-206 of the Educational Supplement and four (4) are at-large appointments.

11. In 1965 the first panel was appointed with ten (10) white and three (3) black members.

12. In 1967 the second panel was appointed with eleven (11) white and two (2) black members.

13. In 1969 the third panel was appointed with twelve (12) white and one (1) black members.

14. In 1971 the fourth panel was appointed with eleven (11) white and two (2) black members.

15. The first list of nominees submitted to the Mayor in 1971 consisted of five (5) whites and four (4) blacks for the three (3) vacancies on the school board.

16. There are several organizations reflecting the views and participation of the black community which could qualify under subsections 1, 2, 3, 4, 5, 6 and 9 of Section 12-206(b). (7 of the 9 enumerated classes.)

17. The person assigned by the Mayor of Philadelphia to choose the groups under the enumerated categories, Deputy Mayor Anthony Zecca, at the time of the hearing in the instant case was unaware of the existence of many of these black organizations.

18. Of fifty-six appointments to non-civil service positions with salaries in excess of $20,000 who are presently serving, five of these, or 9% of the total, were black.

19. The Mayor has made three hundred eighty eight (388) appointments to Boards, Authorities and Commissions, who are presently serving, of whom forty-seven (47) or twelve (12) percent were black.

20. The Board of Education has two (2) blacks of the total membership of nine (9), or twenty-two (22) percent.

21. Although the Charter provides that the chief executive of the organizations enumerated in §12-206(b) of the Educational Supplement be appointed to the panel, persons other than chief executives have been appointed.

## DISCUSSION

Plaintiffs brought this class action under 42 U.S.C. §1983 seeking declaratory and injunctive relief to end alleged racial discrimination in the appointment of members to the Educational Nominating Panel pursuant to the provisions of the Educational Supplement of the Philadelphia Home Rule Charter (hereinafter referred to as the Educational Supplement). More specifically, plaintiffs allege violations of the Equal Protection Clause of the Fourteenth Amendment, the Pennsylvania Human Relations Act, and the express provisions and intended purpose of the Educational Supplement, in that Mayor Tate systematically excluded Negroes from said Educational Nominating Panel.

Preliminary to reaching the merits of plaintiffs' claim, we must first ascertain whether plaintiffs should be certified as a class pursuant to Rule 23 of the Federal Rules

of Civil Procedure. It is clear that a class consisting of all blacks in the City of Philadelphia meets all the requirements of Rule 23(a) in that: "(1) the class is so numerous that joinder of all members is impracticable"; (2) there is a complete identity on all issues of law and facts; (3) the claims of the representative parties are identical to other members of the class; and (4) there is competent representation by the parties bringing the suit. Moreover, the class clearly falls within the purview of Rule 23(b)(2), because it alleges that defendant has acted on grounds which affect all members of the class. Therefore, it is clear that the class must be confirmed.

The Educational Nominating Panel is a thirteen-member body appointed by the Mayor to screen applicants for membership on the school board and nominate three candidates for each current vacancy on the school board (Section 12-207(b) of the Educational Supplement). Nine (9) members of said Panel are required by Section 12-206(b) of the Educational Supplement to be the highest ranking officer of an enumerated city-wide organization or institution described in detail in that section with the remaining four (4) appointees chosen by the Mayor from the citizenry at large to ensure adequate representation of the entire community (Section 12-206(c)).

In deciding whether, in fact, racial discrimination was practiced in Mayor Tate's nominations to the panel plaintiffs ask us to hold that a prima facie case of discrimination can be made out by a mere showing that blacks comprise a substantial portion of the population, that some blacks are qualified to serve, and that few if any blacks have served in the past. In urging this result plaintiffs rely on cases such as *Hernandez v. Texas*, 374 U.S. 475 (1954), *United States v. Greenwood Municipal Separate School System*, 406 F.2d 1086 (5th Cir. 1969), and *Alabama v. United States*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962). This Court recognizes that this general rule has been applied in certain types of cases. As was clearly stated by the Fifth Circuit in *United States v. Jefferson County Board of Education*, 372

F.2d 836 (5th Cir. 1966); *aff'd* on rehearing *en banc*, 380 F.2d 383 (5th Cir. 1967), *cert. denied sub nom., Board of Education of the City of Bessemer v. United States*, 389 U.S. 840 (1967):

> This Court has frequently relied on percentages in jury exclusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low, compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes. Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white children in public schools. *Id.* at 887.

However, this rule has been confined to voting rights, employment, school desegregation and jury cases. *E.g., Norris v. Alabama*, 294 U.S. 587 (1935) (Juries); *Alabama v. United States, supra* (voting); *United States v. Greenwood Municipal Separate School District, supra (schools); United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969) (employment).[1] No case has been called to our attention in which this rule has been applied to an elected chief executive in the exercise of his discretionary

1. One case, *Turner v. Fouche, supra*, has applied the percentage rationale to a school board. However, that case is clearly distinguishable from the instant case. In *Turner* the body which appointed the school board was a grand jury, which should have been constituted from all eligible members of the community. The absence of an appropriate number of blacks on the grand jury raised the presumption of discrimination. Thus, in essence, *Turner* was a grand jury case. In the instant case, 9 of the appointments were limited by law and all citizens are not eligible. Moreover, unlike the situation in *Turner*, the Educational Nominating Panel does not have the authority to appoint Board members but rather only has the authority to submit names to the Mayor. Thus, *Turner* is not controlling in this case.

appointive power. We do have reservations as to whether the Courts have the authority to exercise control over the chief executive in such circumstances; however, we need not decide this question since the facts presented in the instant case render use of this test unfeasible.

It is undisputed that sixty (60) percent of the Philadelphia Public School population and thirty-three (33) percent of the Philadelphia population is black. Plaintiffs contend that the 60% figure should be used in determining whether there has been discrimination in appointments to the panel. With this reasoning, we do not concur. The standard when using a percentage rationale to establish a prima facie case of discrimination has always been the number of blacks qualified to fill the jobs in which the alleged discrimination is taking place. *E.g., Turner v. Fouche*, 396 U.S. 346 (1970); *Hernandez v. Texas, supra.* In the instant case that figure would depend on the *adult population* of Philadelphia, which is approximately 33%.

Mayor Tate's appointments to the Panel include two blacks out of the thirteen appointees, or approximately fifteen point four (15.4) percent of the panel. In its six-year history, the panel has had from 1 to 3 blacks (8% to 23%). With only thirteen members on the Educational Nominating Panel, the addition or subtraction of one member of any ethnic or racial group results in a change of eight (8) percent in that group's representation. In this Court's opinion, such wide fluctuations based on small numerical changes in membership on the Panel result from the limited size of the Panel and render such statistics meaningless as an indicator of racial discrimination. Furthermore, in the cases wherein the percentage rationale has been adopted, there were a large number of blacks within the population eligible for a large number of positions. This is not the situation in the instant case where a small board is involved, and we cannot find that the absence of additional blacks from a thirteen-member panel proves discrimination.

Plaintiffs rely heavily on the fact that only 8.9% (5 of 56) of Mayor Tate's appointments for positions with

salaries in excess of $20,000 have been black. Plaintiffs admit that this fact has no direct bearing on the issues before us, but state that it is relevant to show a pattern of discrimination. However, no case has been presented to us, nor does our research disclose any case, in which a percentage rationale has been used to prove job discrimination without a finding that those allegedly being excluded could qualify for those jobs in roughly the same ratio as they appear in the population. Since no evidence was presented, we cannot assume the percentage who could qualify for such positions. Therefore, the aforesaid statistic is not meaningful, and we do not have to determine whether it is relevant in making a determination on the issue of racial discrimination.

Since the facts of the instant case do not lend themselves to the percentage rationale, plaintiffs must show discrimination by direct proof. The only direct proof offered by the plaintiffs was a newspaper article allegedly quoting Mayor Tate to the effect that he would not appoint any more blacks to the Board of Education. However, since said newspaper article is inadmissible hearsay, there is [no direct proof of discrimination in this record.]

Further, plaintiffs would have us construe Section 12-206(c) of the Educational Supplement to hold that the phrase "representative of the community" refers to racial balance. However, the interpretation of this statute would more properly be decided by the State courts, and we take no position thereto. Similarly, while it is clear that the Mayor has not appointed the chief executive officer of the various organizations selected for representation on the Panel as required by the Educational Supplement, such violations have no bearing on the charges of racial discrimination and should also be decided by the State courts.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction of this case under 28 U.S.C. 1343 (3).

2. This action is properly maintainable as a class action on behalf of black students and parents, on behalf of black organizations which qualify for membership on the Educational Nominating Panel, and on behalf of all black citizens of Philadelphia.

3. The fact that there have been alleged violations of the Charter in appointments to the Educational Nominating Panel, such as the failure to appoint chief executives of organizations to the Panel and failing to appoint at-large members to adequately represent the entire community, are not relevant in determining whether racial discrimination was involved with the appointments and such issues should be litigated in the State courts.

4. In the context of the facts found by this Court, the percentage rationale cannot be used to establish a prima facie case of racial discrimination by defendant in violation of the Fourteenth Amendment in the appointment of members to the Educational Nominating Panel.

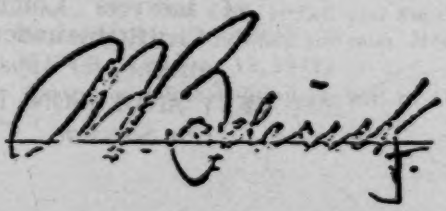
5. The plaintiffs failed to prove that the Educational Nominating Panel was appointed in violation of the Fourteenth Amendment to the Constitution of the United States.

6. Plaintiffs' complaint is, therefore, dismissed with prejudice.

Accordingly, the following Order is entered:

**ORDER**

AND NOW, to wit, this 8th day of November 1971, it is hereby ORDERED AND DECREED that the complaint in the above-captioned matter is dismissed with prejudice.



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 71-2042

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EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN on behalf of themselves and all others similarly situated

*Appellants*

*v.*

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and THE EDUCATIONAL NOMINATING PANEL

---

(D. C. Civil Action No. 71-1938)

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

Argued December 5, 1972

Before VAN DUSEN, GIBBONS and HUNTER,
*Circuit Judges*

---

EDWIN D. WOLF, ESQ.
of Lawyers' Committee
for Civil Rights under Law,
*Attorney for Appellants*
LEVY ANDERSON, ESQ.
*City Solicitor*

JOHN MATTIONI
Deputy City Solicitor
HOWARD D. SCHER
Assistant City Solicitor
*Attorneys for Appellees*

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## OPINION OF THE COURT

(Filed January 11, 1973)

VAN DUSEN, *Circuit Judge*.

Plaintiffs instituted their class action under 42 U.S.C. §1983 (1970) in August 1971 against the Honorable James H. J. Tate ("Mayor"), then Mayor of Philadelphia, and the Educational Nominating Panel ("Panel").[1] They alleged that the Panel had been appointed in a racially discriminatory manner. After considering the stipulated facts and the testimony and exhibits both sides introduced, the district court entered an order on November 8, 1971, dismissing the action.[2] From that order plaintiffs appeal. This court has reviewed the applicable law, which now includes two significant cases decided after the district court order,[3] and has concluded that it is compelled to vacate the district court order and to direct the district court to grant appropriate relief.[4]

---

1. Although defendants did not question the propriety of suing the Panel under §1983, it would appear that the Panel is not a "person" under this section and thus not liable to such a suit. See *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969). Consequently, the district court was correct in dismissing plaintiffs' complaint as to the Panel.

2. The district court opinion in support of this order is reported at 333 F. Supp. 1202 (E.D. Pa. 1971).

3. *Alexander v. Louisiana*, 405 U.S. 625 (1972); and *Smith v. Yeager*, 465 F.2d 272 (3d Cir. 1972), *cert. denied sub nom. New Jersey v. Smith*, 41 U.S.L.W. 3341 (U.S., Dec. 18, 1972).

4. The dismissal in favor of the Panel, however, will be affirmed. See note 1, *supra*.

The Educational Supplement of the Philadelphia Home Rule Charter (Educational Supplement) provides that the mayor appoint the members of the Board of Education. The function of the Panel is to submit to the mayor the names of persons best qualified to serve on the Board. The Panel nominates three persons for each place on the Board to be filled, and an additional three persons if the mayor requests such additional names. The mayor must choose solely from these nominees. See section 12-207(b) of Educational Supplement. The Panel, which has thirteen members, is itself chosen by the mayor. Nine members must be the highest ranking officers of specified types of city-wide organizations, and four are chosen at large.[5] Each Panel serves two years, commencing at or before May 25 of odd-numbered years.

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5. Section 12-206(a)-(b) provides:

"(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

"(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

"(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

"(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

"(3) a public school parent-teachers association,

"(4) a community organization of citizens established for the purpose of improvement of public education,

"(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

"(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

"(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

The Chairman of the Educational Home Rule Charter Commission, which drafted the Educational Supplement, contemplated that the composition of the Panel would "constitute a balanced representation or cross-section of the people of the entire community—all of the community's ethnic, racial, economic, or geographic element and segments."[6] The rationale of the Panel-Mayor-Board arrangement was explained as follows:[7]

> "Selection of the School Board is the key feature of the Charter Supplement. The concept is that the Mayor, as the Chief Executive of the City, elected by and accountable to the entire electorate and community, is the appropriate 'appointing authority' for the School Board. As such, the Mayor is permitted sufficient discretion in School Board selection to preserve such accountability. On the other hand, the Panel is a mechanism for dignified recruitment and screening of top-caliber candidates for the important community post of School Board member.
>
> "The Panel would play a crucial role in selection. It would be constituted and composed in a manner that safeguards the Mayor's accountability, that produces representativeness of the entire community, and that assures responsiveness to community change and development over the years.
>
> "The Panel would perform a governmental role in helping to select a School Board which administers the public school system and the public funds required

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Note 5—*Continued*

> "(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
>
> "(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City."

6. Exhibit D-7, reproduced at App. 15a.
7. Suppl. App. 4a-5a.

to finance it. Therefore, it is proper to restrict Panel membership to residents of the City; yet, its composition will permit the Mayor to select members who are dedicated to the improvement of the larger regional community and whose perspective encompasses the state-wide and national implications of the public education task.

"While the Mayor would be required to select nine members of the Panel from among the principal officers of City-wide organizations, he could select more or all thirteen members from such categories if he wishes. However, through the four at-large memberships, distinguished citizens would not be precluded from serving on the Panel merely because they are not officially identified with a particular community organization at a particular time.

"By specifying categories, rather than particular organizations, in the Charter, the Proposals recognize that community organizations and civic agencies change with time, and that over a period of years there can be wide representation of the many dedicated community groups and civic agencies in our City.

"The Supplement requires the Panel to solicit nominations from all community elements and agencies, study the qualifications of nominees, screen and select nominees, and make recommendations to the Mayor."

This legislative history serves as the background for the facts of which plaintiffs complain. The first Panel, appointed in 1965, had ten white and three black members. The white-black ratios of the 1967, 1969, and 1971 Panels were, respectively, eleven and two, twelve and one, and eleven and two.[8] At the time the 1971 Panel was being

8. Apparently the appointment of one of the two blacks on the 1971 Panel occurred because, after a qualifying city-wide organization had been selected but before its president could be appointed to the Panel, the white president was succeeded by a black.

appointed, blacks constituted about 33.5% of the population of Philadelphia and a much greater percentage, 60%, of the students in the public school system. A number of black-oriented organizations met the specifications of seven of the nine categories of section 12-206(b).

The Mayor not testifying, the only evidence relating to the inner workings of the Mayor's appointment machinery came from W. Wilson Goode, one of the plaintiffs, and from Deputy Mayor Anthony Zecca, the person responsible for recommending to the Mayor organizations which met the requirements of section 12-206(b). Although the district court made no finding on the subject, Mr. Goode testified, without contradiction or objection, that shortly before the 1969 Panel was due to be appointed at a time when there was one vacancy for which the 1967 Panel had not yet made nominations, the Mayor stated that he would appoint no blacks to the Board of Education in addition to the two already on it.[9] Mr. Goode also accused the Mayor of not reappointing to the 1969 Panel organizations which served on the 1967 Panel because of dissatisfaction with the 1967 Panel's having included so many blacks among its nominees.[10]

Deputy Mayor Zecca testified that he had no knowledge of the use of racial criteria in the appointment process,[11] but was unable to recall why the 1967-1969 changes had been made.[12] The district court found that Deputy Mayor Zecca was unaware of the existence of black-oriented organizations which were within the requirements of section 12-206(b).[13]

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9. N.T. 14-17 of Document 14 (E.D. Pa., Civil No. 71-1938). If the Mayor decided, prior to receiving nominees from the Panel, to exclude black nominees from consideration, an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members of the 1971 Panel.

10. *Id.*

11. N.T. 212.

12. N.T. 222.

13. See Finding of Fact 17 at p. 1204 of 333 F. Supp. For example, Deputy Mayor Zecca apparently thought that only the

Assessing all the evidence, the district court ruled that the reasoning of *Turner v. Fouche*, 396 U.S. 346 (1970), where the Supreme Court held that plaintiffs had established a prima facie case of discrimination, did not apply to the present situation. Nevertheless, the court examined this situation as if *Turner v. Fouche* were controlling and concluded that on these facts plaintiffs had not made out a prima facie case. The low percentage of blacks on the Panel was meaningless, the court decided, because the Panel's small size invalidated comparisons between the racial composition of its membership and that of the population of Philadelphia. The court also rejected as unpersuasive various statistics regarding the Mayor's record in appointing blacks to other positions in the city government.[14]

Having thus found no indirect evidence of discrimination, the district court went on to hold that plaintiffs had not established a direct case of discrimination, either, overlooking Mr. Goode's testimony about the Mayor's statement referred to earlier in this opinion.[15] The court apparently

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AFL-CIO and the Greater Philadelphia Chamber of Commerce fit the specifications, respectively, of section 12-206(b)(1) and (2). *See* N.T. 248-52. According to the testimony of Mr. Goode, the United Negro Trade Unions would qualify under section 12-206(b)-(1) and both the Greater Philadelphia Community Development Corporation and the Greater Philadelphia Enterprise Development Corporation, among others, under section 12-206(b)(2). N.T. 4-5 of Document 14 (E.D. Pa., Civil No. 71-1938). The highest ranking officers of these three organizations are black.

Despite Deputy Mayor Zecca's good faith, his failure to familiarize himself with these eligible organizations would, given his important position in the selection process, support an inference that the selection process had a discriminatory effect.

14. Because of our conclusion, it is unnecessary to discuss whether the district court erred in evaluating these sets of data.

15. In view of the result reached on plaintiffs' federal claims, the district court declined to exercise pendent jurisdiction over plaintiffs' claim that the Mayor had also violated state law—namely, various provisions of the Educational Supplement—in selecting Panel members.

concluded that the Deputy Mayor's ignorance of black-oriented organizations did not amount to discrimination against blacks.

It should be noted at the outset that plaintiffs are not seeking to establish any sort of racial quota for membership on the Panel. No group can demand "as a matter of substantive constitutional right, any particular degree of racial balance or mixing. . . ." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971). Plaintiffs ask only that the Mayor of Philadelphia not exclude blacks from proper consideration when making appointments to the Panel. Almost a century ago the Supreme Court articulated the rationale of the Fourteenth Amendment:[16]

> "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

Such is still the law. As the Supreme Court said in *Turner v. Fouche*, 396 U.S. 346, 362 (1970), "the appellants and the

16. *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880).

members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications."

Defendants attempt to distinguish *Turner v. Fouche* on two grounds. First, they suggest that it was significant in *Turner v. Fouche* that the instrument for selecting the members of the School Board was a grand jury, which grand jury was alleged to have been chosen in a discriminatory manner. In other words, defendants argue that the Fourteenth Amendment applies more forcefully to grand juries than to some other public body such as the Panel here, even though the Panel plays a role in the Philadelphia school system analogous to the grand jury in *Turner v. Fouche*. The answer to this argument is that there is no place for discrimination anywhere in the public school system. *See Brown v. Board of Education*, 347 U.S. 483, 493-95 (1954). Secondly, defendants reason that a member of the executive must have considerable discretion in the choice of his personal staff and that the Fourteenth Amendment should not be interpreted to restrain the exercise of this discretion. It is unnecessary for this court to decide whether the Fourteenth Amendment is limited in this way, because it is clear from the language of the Educational Supplement and from the legislative history quoted earlier that the Panel was not intended to operate as part of the staff of the Mayor.

Having determined that discrimination in the appointment of the Panel was impermissible, we turn to the question of whether the plaintiffs succeeded in proving that there in fact was discrimination against blacks.

In holding in favor of the plaintiffs in *Turner v. Fouche*, the Supreme Court relied on three factors: the substantial difference between the proportion of blacks on the list from which the grand jury was chosen (37%) and in the general population (60%); the elimination of 171 blacks out of the 178 persons found to lack "intelligence" or "uprightness;" and the failure of the jury commissioners to familiarize themselves with the black community. In

*Alexander v. Louisiana*, 405 U.S. 625, 630 (1972), the Court pointed out that the various steps taken in the selection process resulted in the "progressive decimation of potential Negro grand jurors" and that "[t]he racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination." This court recently reviewed *Turner v. Fouche* and *Alexander v. Louisiana* and held that to prevail a plaintiff need not show a deliberate practice of discrimination; a prima facie case is established by a demonstration that blacks were under-represented and that there was an opportunity for racial discrimination. *Smith v. Yeager*, 465 F.2d 272, 278-79 (3d Cir. 1972), *cert. denied sub nom. New Jersey v. Smith*, 41 U.S.L.W. 3341 (U.S., Dec. 18, 1972). We also found that ignorance on the part of a jury commissioner had considerable importance. *Id.* at 277.

In the present case the opportunity for discrimination cannot be denied. Unfortunately, the parties did not introduce the expert testimony of a statistician on whether the frequency of black appointments to the 13-member Panel fell outside the range to be expected were race not a factor. However, the small proportion of blacks on the Panel is significant in light of the racial composition of the public schools, which are about 60% black. Because one qualification for Panel membership is interest in the public school system and because the parents of school children are likely to have this interest, a colorblind method of selection might be expected to produce that many more black Panel members. Thus, properly considered, the small proportion of blacks on the Panel points toward the possibility of discrimination. This implication is consistent with the inferences to be drawn from the testimony on the Mayor's Panel and Board selection processes.[16a]

We have carefully gone over the record and have concluded that it made out a prima facie case of discrimination under the above-cited cases. Although on notice of the potential need to present evidence to rebut such prima

16a. *See* notes 9 and 13 above.

facie case evidence,[17] defendants did not offer any reasonable explanations. The only testimony relevant to such explanations was that of Deputy Mayor Zecca,[18] and "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); see also *Turner v. Fouche, supra* at 361; *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 725 (1961).[19] Accordingly, the defendants failed on this record to rebut the prima facie case as a matter of law.

It will be the district court's function to determine the precise nature of the relief to which plaintiffs are entitled. Plaintiffs have limited their complaints to the method of selection of Panel members; they have in no way challenged the operation of the Panel, that is, the confirmed nominations the Panel has made.[20] Consequently, we hold that the district court should issue a declaration that the selection of the members of the 1971 Panel has violated the Fourteenth Amendment and an injunction restraining the Mayor and his successors from considering any nominees for the Board submitted by such Panel. Because of the nearness of the expiration of the 1971 Panel's term of office, it may be unnecessary to have its members

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17. *See* N.T. 106-08, 111-13.

18. The distinguished members of the Panel testified as to its operation. There was nothing in the record to suggest any impropriety whatsoever on their part. However, the question at issue is how they were appointed, not how they conducted themselves.

19. In the *Burton* case, *supra*, the Court used this language at page 725:

> ". . . [N]o State may effectively abdicate its responsibilities [under the Fourteenth Amendment] by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

20. *See* N.T. 265-66. Counsel for plaintiffs conceded at N.T. 266 that this case is not concerned "with the composition of the School Board." Past nominations which have not been confirmed through appointment to the Board by the Mayor will be ineffective.

replaced via a proper selection process. However, the district court should enjoin the present Mayor from discriminating in regard to the 1973 or future Panels and should require that before the 1973 Panel is selected, the Mayor or his staff submit to the court evidence that organizations in the black community which qualify for the various categories of section 12-206(b) of the Educational Supplement have received proper consideration.[21]

The district court's order dismissing plaintiff's complaint will be vacated, except as to the Educational Nominating Panel, and the case remanded to the district court for further proceedings consistent with this opinion.

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21. Mayor Tate has been succeeded by the Honorable Frank Rizzo and the present case has, of course, involved no showing that Mayor Rizzo has in any way discriminated against blacks. Nevertheless, on this record, Mr. Zecca continues as a Deputy Mayor and since this court finds that plaintiffs have shown on this record discrimination in regard to the present Panel, the federal courts must assure that the appointment of the 1973 Panel is free from taint. *Cf. Conover v. Montemuro*, — F.2d — (3d Cir. No. 71-1871, at p. 13 of slip opinion of 12/20/72). Also, we repeat that the defendant Mayor never testified and the court passes no personal judgment on him, but it is required to act on the basis of the record before it.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 71-2042

---

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN on behalf of themselves and all others similarly situated, *Appellants*

*v.*

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and
THE EDUCATIONAL NOMINATING PANEL

---

(D. C. Civil Action No. 71-1938)

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Present: VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

## JUDGMENT

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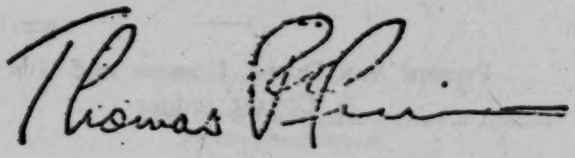
This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 8, 1971, be, and the same is hereby vacated, except as to the Educational Nominating Panel, and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:



Clerk

January 11, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 71-2042

---

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN on behalf of themselves and all others similarly situated, *Appellants*

*v.*

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and THE EDUCATIONAL NOMINATING PANEL

---

Present VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

---

**ORDER AMENDING OPINION**

It is ORDERED that page 11 of the slip opinion filed January 11, 1973, in the above matter is amended as follows:

A. The wording after the semi-colon in the second sentence in the paragraph beginning on that page is changed to read as follows:

> "they do not challenge the operation of the panel insofar as it resulted in appointments to the Board made prior to the filing of this civil action in August 1971.[20]"

B. The following wording is added at the end of the first sentence in footnote 20: "in August 1971."

C. This sentence is inserted immediately after the first sentence in footnote 20:

"On remand, the district court should consider the continuing effectiveness of appointments to the Board made after August 1971 on the basis of all the facts which may be developed at the hearing on such remand."

By the Court:
FRANCIS L. VAN DUSEN
*Circuit Judge*

Dated: February 21, 1973.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 71-2042

---

EDUCATIONAL EQUALITY LEAGUE, FLOYD L. LOGAN, W. WILSON GOODE, VERONICA KELLAM, by her mother and next friend, ELIZABETH KELLAM, and MICHAEL GREEN, by his father and next friend, COOLIDGE GREEN, on behalf of themselves and all others similarly situated, *Appellants*

*v.*

HONORABLE JAMES H. J. TATE, Mayor of the City of Philadelphia, and THE EDUCATIONAL NOMINATING PANEL

---

**SUR PETITION FOR REHEARING**

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Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges*

---

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Francis L. Van Dusen

FRANCIS L. VAN DUSEN
Judge

Dated: February 11, 1973

SUPREME COURT U. S.
JUN 21 1973

IN THE

# Supreme Court of the United States

October Term, 1972 No. 72-1264

THE MAYOR OF THE CITY OF PHILADELPHIA AND THE EDUCATIONAL NOMINATING PANEL OF THE CITY OF PHILADELPHIA,
*Petitioners*

*v.*

EDUCATIONAL EQUALITY LEAGUE, et al.,
*Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR PETITIONERS

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## OPINIONS BELOW

The Opinion of the Court of Appeals, filed January 11, 1973, modified by Order of the Court on February 21, 1973, not yet reported, appears in the Appendix to the Petition for Certiorari, beginning at page 38.

The Opinion of the District Court is reported at 333 F. Supp. 1202 (E.D. Pa. 1971), and appears in the Appendix to the Petition for Certiorari, beginning at page 30.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 11, 1973. A timely petition for re-hearing and re-hearing en banc was denied on February 22, 1973. Petition for Certiorari was filed on March 16, 1973 and was granted on May 7, 1973. The jurisdiction of this Honorable Court is invoked under 62 Stat. 928, 28 U.S.C. Section 1254 (1).